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NOT TO BE PUBLISHED OPINION

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RENDERED: DECEMBER 20, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000104-MR

EDWARD MARQUISE STOKLEY — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA GOODWINE, JUDGE
NO. 09-CR-00899

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant Edward Marquise Stokley was convicted of murdering Lavena Gibson, along with several other crimes. He raises five issues on appeal. The Court finds that while the trial court did commit error in this case, there was no prejudice to the Appellant, and his convictions are hereby affirmed.

I. Background

Appellant and Gibson lived together in a relationship at Appellant's Lexington home, which they shared with his mother, Barbara. When their relationship began to decline, Gibson sought and obtained an emergency protective order (EPO) against the Appellant on October 16, 2008 on the grounds that he threatened her. Gibson requested that the EPO be dismissed four days later. Shortly thereafter, Gibson moved out of the residence and took some of her belongings with her.

Nearly six months later on April 29, 2009, Gibson called the police to ask for an escort to Appellant's house so that she could obtain personal belongings left there when she moved out. After waiting several hours for police, Gibson called Appellant's mother to arrange a time to retrieve her belongings. Gibson asked her friends April Brooks, Angela Brooks, and April's son to accompany her to Appellant's home. April Brooks brought a baseball bat in the automobile as "insurance," though no one expected a confrontation.

Gibson and her friends arrived at Appellant's residence and parked on the road outside the home. Gibson exited the vehicle and went into Appellant's home alone while the others waited in the car. As she entered, Appellant simultaneously exited the house through a different door, having apparently seen the car arrive. He approached the parked car where April, Angela, and April's son were waiting. Appellant apparently saw the passengers in the vehicle but he reached into the automobile, removed the tape deck from Gibson's car, and smashed it on the ground.

Angela testified at trial that she told Appellant that he was being childish. Appellant's mother, who was still in the house, yelled for the Appellant to calm down. He seemed to heed his mother's advice and went back inside the home, where Gibson and Appellant's mother were.

Shortly after Appellant went back inside, April heard yelling coming from inside the house. She grabbed the baseball bat from the car and ran inside. According to April, when she arrived she saw Appellant on top of Gibson on the floor. Appellant's mother testified that Appellant had shoved Gibson down. April witnessed Appellant yelling at Gibson while he was on top of her. At the

same time, Appellant's mother pleaded with her son to get off Gibson and stop yelling.

April testified that she approached Appellant and Gibson while carrying the bat, and claimed that she had intended to rescue Gibson from Appellant. Appellant testified that he believed April might hit him with the bat. At trial, April was asked by the Commonwealth whether she actually swung the baseball bat. She responded that she "got real close," but it is unclear whether she meant that she was too hesitant to swing the bat or whether she swung and missed.

When April approached Appellant with the bat, Appellant had a gun, though April testified that she was unsure whether Appellant pulled the gun out as she approached him or whether he already had it out. Regardless, Appellant pointed the gun at April as she approached him. When Appellant's mother saw the gun, she pushed Appellant away from Gibson and was able to distract him long enough for Gibson to leave through the side door of the home while April ran out the front door.

Gibson and April returned to the car parked in front of the house and Appellant followed after them with the gun still in his hand. Gibson got back in the car and sat in the driver's seat. Appellant went to the car and shot Gibson from pointblank range multiple times, killing her. The police arrived on the scene shortly thereafter and found Appellant in the back of the property.

Appellant was indicted on one count each of murder and felon in possession of a handgun, and three counts of wanton endangerment. He was also charged with being a persistent felony offender in the second degree. At

trial, the Commonwealth argued that Appellant intentionally killed Gibson while Appellant argued that he was acting in self-defense. The jury convicted Appellant of first-degree manslaughter and recommended a sentence of twenty years on the underlying manslaughter conviction, enhanced to fifty years by the second-degree PFO conviction. The trial court followed the jury's recommendation and sentenced Appellant to fifty years. This appeal followed as a matter of right. Ky. Const. § 110(2)(b).

II. Analysis

A. The trial court did not err in refusing to instruct the jury on defensive force in a dwelling.

Appellant claims that the jury should have been instructed on the use of defensive force regarding a dwelling under KRS 503.055. At trial, Appellant tendered a jury instruction that somewhat tracked the language in KRS 503.055(1) and KRS 503.055(3), which create a presumption that a person has a "reasonable fear of imminent peril of death or great bodily harm" if the person against whom force is used has "unlawfully and forcibly entered a dwelling." This fear is the precondition for claiming self-defense. KRS 503.050. KRS 503.055 also states that the person using force has "no duty to retreat." Appellant contends that it was reversible error to exclude his tendered jury instructions.

However, a fundamental flaw in this argument is that the facts simply do not support the giving of any self-defense instruction, much less the requested instruction. Appellant was not charged with committing a murder *in his home.* He was charged with murder committed in the street in front of his home, *after*

Gibson and April had fled the house, gone to the street, and got into the car. Any threat to his person or his home was ended by that time. Instead, he pursued the two women who were clearly on the run. No reasonable person would have felt the use of deadly force was necessary to protect against death or serious physical injury at that point. And the proof simply does not justify an instruction that would have given Appellant a presumption of that belief under KRS 503.055.

He also argues that the proposed instruction is nonetheless relevant because he had "no duty to retreat" under KRS 503.050(3). This Court acknowledges that the trial court must instruct on all relevant aspects of a case. "It is the obligation of the circuit court to instruct the jury on the whole law of the case." *Carver v. Commonwealth*, 328 S.W.3d 206, 209 (Ky. App. 2010). A trial court "is required to instruct the jury on every theory of the case that is reasonably deducible from the evidence." *Fredline v. Commonwealth*, 241 S.W.3d 793, 797 (Ky. 2007) (citing *Manning v. Commonwealth*, 23 S.W.3d 610, 614 (Ky. 2000)). Such "instructions should be stated within the context of the statutory framework." *McGuire v. Commonwealth*, 885 S.W.2d 931, 936 (Ky. 1994). A defense is raised by the presentation of evidence from which a jury could reasonably infer that an element of the crime is excused, and that could justify a reasonable doubt of the defendant's guilt. *Jewell v. Commonwealth*, 549 S.W.2d 807, 812 (Ky. 1977). The sufficiency of the evidence in such situations is a question of law for the courts to determine on a case-by-case basis. *Id.*

The legislature did not intend for "no duty to retreat" to mean the right to pursue an invader who has ceased entering or even being in the residence and has instead fled. The very term "retreat" implies the victim of the violence has no duty to *leave* an oppressor's presence, not that the victim may *chase* down an oppressor who is retreating. Additionally, the statute provides that a person has no duty to retreat, and has a right to meet force with force, only "if he or she reasonably believes it necessary to do so to prevent death or great bodily harm to himself or another or to prevent the commission of a felony involving the use of force." KRS 503.050(3).

While it is possible that Appellant stood his ground within the house, he did far more than that when he chased Gibson and April outside the home, and shot Gibson after she got into her car in an attempt to leave, with three other persons in the close confines of the car. Appellant did more than simply stand his ground—he took advantage of the women's retreat to take more ground, to pursue the fleeing women. While April's actions might have been threatening and might have justified Appellant in using force against her to defend himself inside the house, when she left the house and fled, Appellant's response was no longer warranted.

The trial court did commit error here, but it was in giving a self-defense instruction in the first place, which inured to the Appellant's benefit. While the trial court did not give the instruction Appellant wanted, it did give a standard self-defense instruction. It is the trial court's duty to instruct based on the evidence, and there was none in this case that could convince a reasonable juror (or trial court) that when Appellant left his home, followed the women to

the street, and shot Gibson repeatedly at point blank range that he was under any kind of threat to his person. While giving the instruction was error, it accrued to the Appellant's benefit in that it allowed him to make a defense that he was not entitled to under the facts. There is no basis for reversal on this issue, and Appellant's arguments are not well-taken.

B. Trial court did not err in admitting a dismissed EPO obtained by the victim against the Appellant.

At trial, the Commonwealth introduced evidence that Lavena Gibson obtained an emergency protective order against Appellant on October 16, 2008, that she requested be dismissed on October 20, 2008. Appellant contends that the trial court erred in allowing the jury to learn about the EPO, especially because it had been dismissed approximately more than six months before the date that Appellant killed Gibson. It should be noted that the trial court did not admit proof of the underlying facts that led to the EPO, but rather only allowed testimony of Amy Webb of the Administrative Office of the Courts' Domestic Violence Division that Gibson had applied for and received an EPO on that date.

Prior to trial, the Commonwealth filed notice, as required by KRE 404(c), that it intended to introduce evidence of the entry of the EPO as proof of other crimes, wrongs, or bad acts. Proof of the entry of an emergency protective order has long been held in Kentucky to be indirect evidence of an underlying "bad act" and is thus governed by KRE 404(b).[1] *See, e.g., McCarthy v.*

[1] The EPO itself is not a "bad act" for the purposes of KRE 404(b). Rather, the Appellant's conduct that led to the issuance of the EPO is the "bad act," with the EPO itself being indirect evidence of that underlying bad act. Nevertheless, even indirect

Commonwealth, 867 S.W.2d 469 (Ky. 1993). The standard of review for the admission of a prior bad act is whether the trial court abused its discretion. *Matthews v. Commonwealth*, 163 S.W.3d 11, 19 (Ky. 2005). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

The general rule, expressly stated in KRS 404(b), is that prior "bad acts" are inadmissible to prove the character of a person in order to show action in conformity therewith. KRE 404(b) provides exceptions to this general rule, stating that such evidence "*may* ... be admissible ... [i]f offered for *some other purpose*, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." As it does with all relevant evidence, KRE 403 limits the admissibility of evidence that falls within the "some other purpose" exception by allowing the exclusion of evidence "if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

Reading these provisions together, this Court provided a three-part test to determine the admissibility of such evidence. *See Bell v. Commonwealth*, 875 S.W.2d 882, 889-90 (Ky. 1994). *Bell* requires three inquiries in determining the admissibility of evidence of prior bad acts: relevance, probativeness, and prejudice.

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evidence of an underlying "bad act" is only admissible "if offered for some other purpose" under KRE 404(b)(1).

The *Bell* test, which is less a test than merely a recitation of KRE 404(b) and KRE 403, addresses those concerns with the following three questions: Is the other crimes evidence relevant for some other purpose other than to prove the criminal disposition of the accused? Is the evidence of the uncharged crime sufficiently probative of its commission by the accused to warrant its introduction into evidence? Does the potential for prejudice from the use of other crimes evidence substantially outweigh its probative value? *Id.*

Appellant contends that the evidence of the EPO is not relevant other than to prove his criminal disposition, and is thus inadmissible. The Commonwealth, on the other hand, argues that evidence of the EPO showed Appellant's possible motive to want to harm or kill Gibson, and thus fell under the "some other purpose" exception in KRE 404(b)(1). The Commonwealth sought to admit this evidence because, while the identity of Gibson's killer was not in question, Appellant had presented a defense of self-protection. Thus, introduction of the EPO was important to the Commonwealth to refute that Appellant was acting in self-defense and that he had no other reason to kill Gibson.

While this Court has held above that the defense of self-protection did not warrant an instruction under the evidence in this case, the Appellant was nonetheless entitled to make such a defense, and did so. This necessarily meant the Commonwealth had to refute that defense of self-protection.

In arguing that the EPO should be admitted, the Commonwealth relied on this Court's holding in *McCarthy* that

> [i]t is quite evident that the EPOs, issued at the behest of the victim, ordering appellant to stay away from her house, in the time framework of this case, are relevant as evidence of motive or state of mind, and also as part of the immediate circumstances bearing on the crimes charged.

McCarthy, 867 S.W.2d at 470; *see also Matthews v. Commonwealth*, 709 S.W.2d 414, 418 (Ky. 1985) (holding that a sexual abuse warrant obtained against a person accused of murder five weeks prior to the murders was relevant not only as to motive and state of mind of the appellant, but also to the immediate circumstances bearing on the crimes charged). At the very least, the EPO gave Appellant a motive to seek revenge against Gibson, and thus proof that the EPO had been entered was relevant and for a permissible purpose under KRE 404(b).

Appellant attempts to distinguish cases allowing admission of an EPO as proof of motive or state of mind on two grounds. First, he argues that even if the Court were to find the EPO tended to show motive, it should nevertheless find that the EPO Gibson obtained against him was not probative because it was too remote in time, having been dismissed and inactive for more than six months. Appellant cites *Barnes v. Commonwealth*, 794 S.W.2d 165, 169 (Ky. 1990), in which the Court stated that two incidents of domestic violence, one seven years before the defendant murdered his wife and another more than four years before, were too remote in time to be admitted at trial. The Court stated that "[a]cts of physical violence, remote in time, prove little with regard to intent, motive, plan or scheme; have little relevance other than establishment of a general disposition to commit such acts; and the prejudice far outweighs any probative value in such evidence." *Id.*

Second, Appellant argues that because the EPO was inactive at the time of Gibson's murder, and in fact had been dismissed only four days after Gibson obtained it, its probative value, when compared to an active EPO, was substantially outweighed by the danger of undue prejudice. Appellant correctly points out that this Court's previous cases examining whether an EPO is relevant to show motive or intent only discussed the situation of an active EPO, and thus are not completely on point.

As to the claim that this Court should apply *Barnes* and decide that the EPO was too remote in time, we note two characteristics that distinguish that case. First, *Barnes* did not contemplate an EPO whatsoever. Rather, it only involved the Commonwealth's attempt to introduce evidence of domestic abuse. We find this difference to be vital. Evidence of domestic abuse alone, especially domestic abuse that occurred more than four years in the past, is not relevant in proving motive or state of mind. That a husband abused his wife four years ago does not tend to prove that he had motive to kill her or that he was seeking revenge in any way. As noted above, no evidence of the alleged abusive acts that led to the EPO in the first place was admitted against Appellant.

Second, and most obvious, the remoteness in time of the prior bad act in *Barnes* was drastically different than in Appellant's case. Here, the trial court used its discretion to determine that six months was not too remote in its decision to admit evidence of the EPO. Given that Gibson still had personal belongings at Appellant's house that had neither been returned to her nor discarded by Appellant, there was evidence that suggested that not too much time had elapsed since the EPO for this Court to determine that the trial

court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *English*, 993 S.W.2d at 945. Appellant cannot prevail on this argument.

As to Appellant's claim that the EPO's probative value was substantially outweighed by the risk of undue prejudice because it had been previously dismissed, this Court likewise does not agree. While the issue of the probative value of a dismissed EPO has not previously been addressed in this jurisdiction, the principles of KRE 404(b) and KRE 403 guide the analysis.

The Commonwealth introduced the EPO to establish that Appellant had a motive for revenge against Gibson because she had obtained an EPO against him. That the EPO had been dismissed may suggest that it was less probative of the motive for revenge because there is no longer an active restrictive court order against Appellant. On the other hand, the trial court may have found the fact that the EPO was dismissed only four days after it was obtained to be even *more* probative of Appellant's motive for revenge than an active EPO because the dismissed EPO may have not been made in good faith, or may have been dismissed due to a threat by the Appellant. The weight of the evidence was a proper question for the jury.

While evidence that reflects poorly on a criminal defendant is by definition "prejudicial," KRS 403 requires both that it be *unduly prejudicial* and that the prejudice *substantially* outweigh its probative value. A trial court's ruling under KRE 403 is reviewed for abuse of discretion, *Barnett v. Commonwealth*, 979 S.W.2d 98, 103 (Ky. 1998). Given that the Commonwealth had a legitimate reason to admit the fact of the EPO to refute Appellant's

assertion that he was merely acting in self-defense when he shot and killed Lavena Gibson, and to refute that Appellant was acting under extreme emotional disturbance, this Court cannot find that the trial court abused its discretion in determining that the EPO was admissible under KRE 404(b) and KRE 403.

Appellant also argues that the EPO was inadmissible because it was hearsay. However, as noted above, the statements made by Lavena Gibson in obtaining the EPO were not introduced. Rather, the Commonwealth introduced only that the EPO had been issued. Thus, evidence of the EPO itself, without the underlying statements that led to the EPO, was not being used to prove the truth of the matter asserted in those statements and was not hearsay under KRE 801(c).

C. Trial court did not substantially deviate from proper voir dire procedures.

Appellant claims that he was denied his right to due process and an impartial jury because the trial court required both sides to voir dire the entire jury panel, a departure from administrative procedure. Prior to jury selection, Appellant filed a motion for fair and efficient selection of jury panel for group voir dire asking that he only be required to address a portion of the venire (specifically, the jurors sitting in the jury box) at one time. The trial court instead held that the attorneys would voir dire the entire panel instead of thirty-two at a time.[2] This, as noted by the trial court, ensured that all jurors

[2] The jury panel must include at least thirty-two venire persons. Thirty-two is the requirement because a criminal defendant is entitled to a jury of twelve persons, and both the Commonwealth and the defense are allotted eight peremptory challenges. RCr

were paying attention to all the questions during voir dire. This is a common practice that avoids having to repeat all the voir dire questions each time a juror is excused and another is drawn to sit in the jury box. Appellant contends that requiring him to voir dire a larger panel[3] than thirty-two deprived him of due process and an impartial jury because the larger panel was "not a manageable number" and deprived Appellant's counsel the opportunity to observe prospective jurors while they were formulating answers to voir dire questions.

This Court has made clear that it will not reverse a conviction based on claims that a trial court failed to follow the proper administrative procedures in jury selection unless there has been "a substantial deviation from the proper administrative procedure." *Monroe v. Commonwealth*, 244 S.W.3d 69, 74 (Ky. 2008). Moreover, "[t]his Court has made it clear that it will not consider minor errors in jury selection reversible unless some prejudice is demonstrated." *Id.* For example, in *Robertson v. Commonwealth*, 597 S.W.2d 864 (Ky. 1980), this Court determined that the procedure whereby "the trial court called jurors during voir dire in order of their assigned number, and replaced each stricken juror with the next juror in line, sequentially," *Hayes v. Commonwealth*, 320 S.W.3d 93, 96 (Ky. 2010) (citing *Robertson*, 597 S.W.2d at 865), to be "a

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9.40(1). In addition if one or two additional jurors are called, the number of peremptory challenges allowed each side shall be increased by one. RCr 9.40(2). Thus, the minimum panel is thirty-two persons.

[3] The Commonwealth and Appellant disagree about how large the panel was. Appellant contends that the panel consisted of eighty-five persons. The Commonwealth, on the other hand, contends that there were only fifty-three persons left in the jury panel, after strikes for cause and Commonwealth's peremptory strikes, when Appellant conducted group voir dire.

substantial deviation from the then established procedures because it equipped the parties with the ability to manipulate their strikes to obtain a particular person." *Id.*

Appellant contends that he was prejudiced because he was not able to properly observe the jurors or to effectively and intelligently exercise his right to peremptory challenges and challenges for cause. This, however, is not an allegation of a departure from established procedure, and this Court sees no error in it.

Appellant also complains that the trial court in his case deviated from its own prior practice in a capital case whereby it broke the 120-person venire into three groups of 40 for voir dire. While it is true that the procedure employed by the same trial court in the previous capital case differs from the procedure used in Appellant's case, this argument does not demonstrate that any error occurred because the standard from *Robertson* requires a "substantial deviation" from established administrative procedures then in place. That the trial court deviated from its own prior practice is not grounds for claiming error at all.

D. The trial court did not abuse its discretion in denying individual voir dire or a change of venue.

Prior to trial, Appellant filed a motion for individual voir dire. In support of his motion, Appellant argued that his case had similarities, due to the domestic violence elements, to the highly-publicized case of Steve Nunn, a former state legislator who shot his girlfriend outside her Lexington, Kentucky home a few months after Appellant had killed Lavena Gibson. Appellant

contended that the Nunn case, especially because Nunn had been the subject of an EPO by his girlfriend prior to her murder, had the potential to inflame the passions of potential jurors such that he would not be able to receive a fair trial, and thus he should have been entitled to conduct individual voir dire.

While it is true that an accused person has the right to an impartial and indifferent jury, *Irvin v. Dowd*, 366 U.S. 717 (1961), the "separate examination of jurors or prospective jurors in circumstances of potential prejudice is a matter of procedural policy and is not a requirement of due process." *Ferguson v. Commonwealth*, 512 S.W.2d 501, 503 (Ky. 1974). A trial court is given broad discretion in conducting voir dire, *Manning v. Commonwealth*, 23 S.W.3d 610, 613 (Ky. 2000), and the ultimate question of whether individual voir dire is to be conducted is within the discretion of the trial court, *Thompson v. Commonwealth*, 862 S.W.2d 871, 874 (Ky. 1993), *overruled on other grounds by St. Clair v. Commonwealth*, 140 S.W.3d 510 (Ky. 2004), except in capital cases. RCr 9.38.

The trial court denied Appellant's motion, but held that the attorneys could ask about domestic violence in general voir dire and any answers from the jurors could be addressed at the bench. Thus, while the trial court did not grant individual voir dire *per se*, prolonged discussions with jurors regarding witnessing domestic violence took place at the bench outside the presence of other jurors. After voir dire and exercising strikes, Appellant accepted the panel and thus the Appellant essentially got what he requested. He was able to conduct a form of individual voir dire about the issue of domestic violence. While the trial court was not required by rule to conduct individual voir dire, it

nevertheless afforded broad leeway on the domestic violence question. Thus, this Court holds that the trial court did not abuse its discretion in denying Appellant's motion.

As an alternative to conducting individual voir dire, Appellant requested a change of venue on the same grounds that the "recent very similar but unrelated domestic violence case involving defendant Steve Nunn has tainted the jury pool for" the Appellant. The trial court denied Appellant's motion, stating that it would attempt to seat a jury and if unsuccessful would revisit the issue. After jury selection, Appellant and the Commonwealth accepted the jury and requested no further relief. Appellant is entitled to no relief on this issue.

Interestingly, Appellant's claim at trial and on appeal departs from the typical case where a criminal defendant files a motion for a change of venue because *his* trial has received unusual publicity. In this case, Appellant contends that the publicity surrounding another person's case caused sufficient publicity for domestic violence cases generally such that Appellant could not have received a fair trial. While there is no requirement in our case law that requires publicity to be about the specific defendant, only in the most exceptional circumstances would such a situation reach the "reasonable likelihood that prejudicial news prior to trial will prevent a fair trial" standard set forth by the U.S. Supreme Court in *Sheppard v. Maxwell,* 384 U.S. 333 (1966).[4]

[4] In *Sheppard*, the Supreme Court held that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue

E. The trial court did not abuse its discretion by denying Appellant's motion for a continuance.

For his final assignment of error, Appellant contends that he was entitled to a continuance on the grounds that he had not received records from the Cabinet for Health and Family Services that he had previously requested until just before the penalty phase was to begin. Appellant contends that the report included information on the Appellant's troubled childhood, including allegations of sexual abuse both at the hands of his biological mother and while in the foster care system. Appellant argued a need for a continuance to determine which witnesses he would need to introduce the reports. The trial court denied the motion, but told the defense that Appellant could testify as to abuse.

RCr 9.04 describes the requirements for a continuance, stating in pertinent part:

> The court, upon motion and sufficient cause shown by either party, may grant a postponement of the hearing or trial. A motion by the defendant for a postponement on account of the absence of evidence may be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it.

Appellant failed to provide an affidavit showing the materiality of the evidence expected to be obtained and that due diligence has been used to obtain it. There is no abuse of discretion in denying a motion for continuance on the grounds that an affidavit showing materiality and due diligence had not been

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the case until the threat abates, or transfer it to another county not so permeated with publicity." *Sheppard*, 384 U.S. at 363. Thus, there are three elements that the party requesting a change of venue must show: (1) there has been prejudicial news coverage; (2) the news coverage occurred prior to trial; and (3) the effect of such news coverage is reasonably likely to prevent a fair trial.

made. *See, e.g., McFarland v. Commonwealth,* 473 S.W.2d 121 (Ky. 1971) ("There is nothing in the record to show that the affidavit complied with the requirements of RCr 9.04 with respect to showing the materiality of the evidence expected to be obtained, that due diligence was used to obtain the evidence, the facts the affiant believed the witness would prove, and that the affiant believed those facts to be true.").

Moreover, there is a question of whether Appellant could have shown due diligence in an affidavit sufficient to satisfy the trial court. Appellant admitted that he attempted to obtain the documents from the Cabinet two months before trial, but after being told that he needed a court order, he waited eight days before trial to officially request them.

While the Appellant failed to file the required affidavit, the decision whether to grant a continuance rests solely with the trial court's discretion. *Snodgrass v. Commonwealth,* 814 S.W.2d 579, 581 (Ky. 1991). When ruling on a motion for a continuance, "a trial court should consider the facts of each case, especially ... 'length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; ... complexity of the case; and whether denying the continuance will lead to identifiable prejudice.'" *Edmonds v. Commonwealth,* 189 S.W.3d 558, 564 (Ky. 2006) (quoting *Snodgrass v. Commonwealth,* 814 S.W.2d at 581, and discussing RCr 9.04)).

While Appellant argues that he only requested a short continuance, a continuance at the penalty phase of the trial in order to subpoena witnesses may have caused a lengthier delay. A previous continuance had been granted

for Appellant, though it was because his counsel was going on maternity leave. Given that the court and all parties were prepared to proceed with the penalty stage of the trial, the inconvenience would have been considerable, and the delay was largely caused by the Appellant himself. Additionally, Appellant has not shown identifiable prejudice given that the jury heard ample testimony about his troubling childhood. The trial court did not abuse its discretion.

III. Conclusion

Having found that the trial court did not materially err as to any of Appellant's issues on appeal, we hereby affirm Appellant's convictions in their entirety.

Minton, C.J.; Cunningham, Noble, Scott and Venters, JJ., concur. Abramson, J., concurs in result only. Schroder, J., not sitting.

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